United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1749

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P/S

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1749

IRVING GORDON,

Plaintiff-Appellant,

—against—

ROBERT L. BURR and ELPAC, INC.,

Defendants-Appellees,

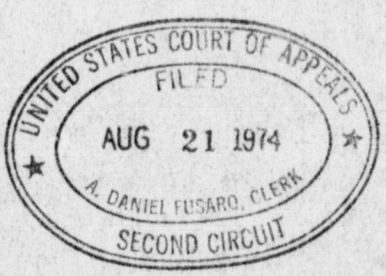
and

ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC.
(sued herein as PHILLIPS, APPEL & WALDEN),

Defendants-Appellees-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE, ELPAC, INC.



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IRVING GORDON,

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- against -

ROBERT L. BURR, Defendant-Appellee; ELPAC, INC., Defendant-Appellee; ARNOLD LORD, Defendant-Appellee-Appellant; and PHILIPS, APPEL & WALDEN, INC., (Sued herein as PHILLIPS, APPEL & WALDEN), Defendant-Appellee-Appellant.

BRIEF FOR DEFENDANT-APPELLEE ELPAC, INC.

PRELIMINARY STATEMENT

This brief of Elpac, Inc., a Defendant-Appellee (hereinafter referred to as "Elpac") is addressed solely to the appeal by Plaintiff-Appellant Irving Gordon (hereinafter sometimes referred to as "Gordon" or as "Plaintiff-Gordon") from:

(a) each and every portion of a judgment after trial, by the Court without a jury, of the United States District Court for the Southern District of New York (Bauman, J.) which: (i) awarded Plaintiff-Gordon judgment against Defendant-Appellee Robert L. Burr

(hereinafter referred to as "Burr") in the sum of $45,000 (the amount sued for) (App. 53a) (1); (ii) dismissed the complaint against Elpac on the merits (App. 54a); dismissed the action against Defendant-Appellee- Appellant Arnold Lord (hereinafter referred to as "Lord") upon the stated grounds "inasmuch as Plaintiff has stated no claim against said Defendant" (App. 54a); and (iii) dismissed the action against Defendant-Appellee-Appellant Philips, Appel & Walden, Inc. (hereinafter referred to as "P.A.W.") upon the stated grounds "inasmuch as Plaintiff has stated no claim against said Defendant" (App. 54a); and

(b) an order of such District Court (Bauman, J.) denying Gordon's motion for an order setting aside the above referred to judgment and "(1) amending or making new findings of fact and conclusions of law on the grounds that the findings of fact, conclusions of law and judgment are erroneous; or (2) in the alternative, granting a partial new trial (or taking additional testimony) limited to the issue of plaintiff's damages."(2)

Because of the nature of the cross-appeals herein by Lord and P.A.W., Elpac necessarily takes no position with respect thereto.

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(1) Numbered references herein to "App." refer to pages of the Appendix, which, in the case at bar, includes, substantially, the entire Record on Appeal.

(2) The affidavit submitted to the Court below on such motion (App. 58a-59a) makes it explicitly clear that Gordon was not seeking any relief against Elpac and that his motion sought only relief against Lord and P.A.W. See also: App. 62a-63a.

ISSUES PRESENTED FOR REVIEW

Due to the fact that the complaint in this action is bottomed upon Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78j(b) and Rule 10b-5 promulgated thereunder (17 C. F.R. Sec. 240.10b-5), it seeks to impose liability upon as many persons as possible, and, therefore, contains the characteristic "glib generalizations" of a 10b-5 complaint. (3)

While Plaintiff-Gordon was successful at the trial and obtained a judgment for the full amount sued for against Burr, the person who sold him the stock involved in the transaction complained of, he is not satisfied, as naturally enough, he prefers a haul-seiner's net judgment against everybody.

Accordingly, different issues are presented on this appeal vis-a-vis the different parties. Insofar as Elpac is concerned, it is submitted that the issues presented for review are as follows:

1. Does the "unless clearly erroneous" standard of Rule 52(a) F.R. Civ. P. preclude reversal of the judgment of the Trial Court that the complaint against Elpac should be dismissed on the merits?

2. Do the District Court's findings of fact support the conclusion that the complaint against Elpac should be dismissed on the merits?

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(3) See: Lanza v. Drexel & Co.,479 F. 2d 1277, 1281, (2d Cir., 1973). See also: Heyman v. Heyman, 356 F. Supp. 958, 960, (S.D. N.Y. 1973). The Section and Rule are set forth in the Addendum, infra.

3. Should each of the appeal from the judgment of the Trial Court and from the order of the Trial Court denying Gordon's motion for a new trial be dismissed as against Elpac upon the ground that each is frivolous?

STATEMENT OF FACTS

Gordon, in the advocacy of his attempt to show "involvement" of Elpac in the alleged "scheme to defraud" him (Pages 4 and 38 of Gordon's Brief to this Court) has completely lost sight of the allegations of his Complaint and of the fact that such allegations are at complete variance with his now attempt to impose liability upon Elpac. Accordingly, and for appropriate perspective, it is necessary for Elpac to here review for this Court some of Gordon's allegations in his Complaint in somewhat more detail than is usually appropriate for an appellee.

The key allegations pertaining to Gordon's claimed cause of action appear in paragraphs 9, 10, 11, 12 and 13 of his Complaint.

A - The alleged conspiracy and alleged representations.

In simple abbreviated substance, paragraph 9 of the Complaint (App. 5a-6a) alleges that Lord and Burr, (4) acting for themselves and for Elpac and P.A.W. conspired together and entered into a

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(4) While the trial transcript shows that Burr was President of Elpac in June of 1968 (App. 15a), Elpac readily admitted that Burr continued to be its President until August 7, 1968 (see paragraph "2" of Second Defense and Cross Claim contained in Elpac's Answer at App. 11a) and the Trial Court found (App. 41a) that "Burr ceased being Elpac's president on August 7, 1968, although he continued to be a director."

scheme to cause Gordon to purchase 4,500 shares of Elpac stock owned by Burr for the aggregate sum of $45,000 by warranting and representing that:

(a) an arrangement for the sale of 20,000 shares of Elpac stock owned by Burr, which arrangement had been described to Gordon at a meeting of certain persons held in June, 1968, and which stock had been offered to such persons, had been consummated;

(b) each of the persons present at the meeting had agreed to purchase his allotted shares and was forwarding his check for the same;

(c) the stock would be registered (Gordon meant under the Securities Act of 1933) no later than April 30, 1969;

(d) Burr would receive written permission from Elpac to consummate the sale of his shares to Gordon;

(e) Burr would receive written permission from the California State Commission to consummate the sale;

(f) Burr would receive written permission from any banks to which Elpac was indebted to consummate the sale;

(g) Burr would deliver a written guaranty as to when the stock would be registered;

(h) Burr would lend to Elpac the funds received from the sale of his stock for the purpose of causing it to pay the corporate note or notes held by creditor banks, which notes had been personally guaranteed by Burr; and

(i) Elpac was operating at a profit and had enough current orders to produce a big profit for 1969.

B - Gordon pays for the stock.

Paragraph 10 (App. 6a) alleges that on or about August 22, 1968, Gordon paid Burr $45,000 for the shares.

C - The statutory allegations.

Paragraph 11 (App. 7a) contains the usual mouthing of the statutory language of Section 10b and Rule 10b-5.

Paragraph 12 (App. 7a) alleges that subdivisions "a" through "i" of Paragraph 9 of the Complaint (described in detail above) constituted the "manipulative, deceptive and fraudulent devices and artifices" and the "untrue statements of material facts and the omissions to state material facts" etc. referred to in Paragraph 11.

D - The representations alleged to be false.

Paragraph 13 (App. 8a) - and this is the paragraph of the Complaint which Gordon necessarily set out to prove at the trial (as indeed was his burden) - alleges that each of the representations contained in subdivisions "a" through "i" of Paragraph 9 of the Complaint (described in detail above) were false and known to be false. The key allegations of Paragraph 13, insofar as Elpac is concerned, are that "said representations and statements were false and known to be false by defendants when made by reason of the following:

"(c) The stock purchased by the plaintiff was not registered by April 30, 1969, or at any time thereafter.

"(d) The Defendant Burr did not receive permission from the Defendant Elpac to consummate the sale of his stock to the plaintiff.

" * * *

"(f) The Defendant Burr did not receive written permission from creditor banks of defendant Elpac to consummate the sale of his stock to the plaintiff.

" * * *

"(h) The Defendant Burr did not lend the funds received from the plaintiff to the Defendant Elpac and the Defendant Elpac did not pay corporate notes held by creditor banks."

E - The now paradoxical distortion of the facts by Gordon.

The findings of fact of the Trial Court with respect to Elpac are fully discussed infra in Point I and, except for one brief mention, no useful purpose would be served by also discussing them here other than to submit that such findings of fact warranted (and, indeed the entire record warrants) the ultimate fact and legal conclusion that Gordon's complaint against Elpac should be dismissed on the merits.

The point that should be here mentioned is that, most paradoxically, Gordon now contends, in substance, that:

(i) his attempted factual proof at the trial of the falsity of the representations made to him by Burr, as set forth in Paragraphs 9, 12 and 13 of the Complaint, imposed a burden upon Elpac to either join with him in such proof, or to prove their truth; and

(ii) Elpac's failure to do so created an inference (or, if you will, "evidence") of the truth of the very things that Gordon was trying to prove were false.

To say it another way, Gordon contends that proof of a negative simultaneously constitutes the creation of an inference of proof of a positive - and - for that matter - vice versa. The Trial Court, of course, rejected such a proposition (App. 41a-42a, and see also App. 249a-252a).

POINT I

THE "CLEARLY ERRONEOUS" STANDARD PRECLUDES REVERSAL OF THE JUDGMENT INSOFAR AS ELPAC IS CONCERNED.

A - The findings as to the alleged misrepresentations.

The pertinent substantive findings of fact made by the Trial Court with respect to the making of the alleged misrepresentations by Burr and Lord (5) were as follows:

1. "Plaintiff has not succeeded in establishing all of the misrepresentations alleged in his complaint." (App. 28a).
2. "I am nevertheless satisfied that Lord and Burr did make at least one determinative misstatement regarding the extent of the participation in the Elpac offering. (App. 28a).

   "At the meeting at Steinberg and Pokoik, (June 1968) Burr stated that he was only interested in selling his 20,000 shares as a package, and would not sell any

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(5) Since there were no dealings between Gordon and Elpac, the findings, insofar as they relate to the making of the alleged misrepresentations, necessarily had to relate only to Burr and Lord.

lesser amount. At the meeting of July 18, 1968, at P.A.W., Gordon was told by Lord that all of the other members of the group had executed the documents then presented to Gordon, and on August 22, both Burr and Lord assured Gordon that other members of the group had effected payment in the same way that Gordon had. These statements were demonstrably false." (App. 29a).

3. "I am convinced that the misstatements regarding the participation of other members of the Steinberg and Pokoik group were highly material." (App. 30a).

4. Gordon relied on such misstatements (App. 32a).

5. " * * * I find that Lord and Burr possessed the requisite knowledge of the falsity of their representations to Gordon. In the meetings of July 18 and August 22, when they told Gordon that others had already subscribed to the Elpac offering, they could not help but realize the falsity of these statements. It is admitted that the additional copies of the documents which Gordon signed on July 18 were kept at P.A.W., and thus Lord must have known whether or not others had executed them. In addition, I find that the repeated failure to produce the Elpac financial statements in the face of Gordon's persistent requests is other and additional evidence of their intent to hide from him the realities of Elpac's financial condition. Any suggestion that this failure was purely inadvertent staggers the imagination in its audacity." (App. 35a)

Gordon in his Brief to this Court, does not challenge the above findings and does not contend that the Trial Court committed error in not finding that other "material" misrepresentations had in fact been made. (See also Point IV, infra).

B - The findings as to Elpac's participation.

The pertinent substantive findings of fact (6) made by the Trial Court relating to Elpac were as follows:

1. "Burr ceased being Elpac's president on August 7, 1968, (7) although he continued to be a director." (App. 41a).
2. "Although some of his misrepresentations were made before this date, still others were made later. In particular, his telegram to Gordon of August 20, signed 'Robert L. Burr Elpac Inc.' could not have been a statement by Elpac." (App. 41a). (8)
3. "Much more importantly, I do not consider any of Burr's activities to be corporate acts. He was selling his own stock, not Elpac's." (App. 41a).
4. "There was some testimony (*) at the trial that Burr had stated at the June meeting that the proceeds of

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(6) To some extent such findings of fact also included conclusions of law.

(7) Gordon paid his $45,000 to Burr on August 22, 1968 (App. 109a).

(8) See also infra at page 17.

the sale of the shares would be used to pay off an Elpac bank loan that Burr had cosigned. But the record contains not the remotest indication of the use to which the money was ultimately to be put."(App.41a)(9).

5. "Nor does the record contain any evidence that Elpac participated in or indeed knew anything of Burr's fraudulent acts." (App. 41a).

6. "It is not even entirely clear, whether or not the Elpac board ever authorized registration rights for the stock Burr sold. Despite the representation in Burr's telegram, no corporate minutes were introduced in evidence to substantiate this claim." (App. 41a) (10).

7. "The extent of Elpac's involvement in this transaction appears to have been the purely ministerial act of transferring some of Burr's shares on the books of its transfer agent." (App. 41a) (11).

8. " * * * plaintiff has failed to introduce any greater evidence of Elpac's involvement than the fact that Burr

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(9) The (*) represents a footnote reference , i.e., "12," by the Trial Court which reference is to pages 167-168 of the Trial Transcript, which pages are at 240(a) and 241(a) of the Appendix. See also infra, at pages 15 - 17.

(10) See also infra, at pages 18 - 19.

(11) The transfer of Burr's shares to Gordon on the books of Elpac's stock transfer agent had been insisted upon by Gordon (App. 116a) and, since Elpac was a California Corporation (App. 11a), was required to be performed by Section 8401(1) of the California Commercial Code, which is substantially the same as N.Y.U.C.C. 8-401. See also, Kanton v. U.S. Plastics, Inc., 248 F.Supp. 353, (D.N.J., 1965).

was for a time Elpac's president. If I were to find Elpac liable, it would be on this fact alone, and I am unwilling to reach such a conclusion." (App. 41a-42a).

C - The finding as to Section 20(a) liability of Elpac.

The sole finding of fact made by the Trial Court relating to possible liability of Elpac under Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78t) (12) (which Section is set forth in the Addendum, infra, and is herein referred to as "Section 20(a)") was as follows:

> "I find no evidence in this record of control, direct or indirect of Burr by Elpac in what were clearly not corporate acts." (App. 42a).

D - The findings of fact as to Elpac were not "clearly erroneous."

Elpac submits that the findings of fact of the Trial Court relating to Elpac, as set forth above, are findings of "basic fact" and that, accordingly, this Court is governed by the "unless clearly erroneous" standard of Rule 52(a), F. R. Civ. P.

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(12) The Trial Court's opinion stated that Gordon "in effect" amended his complaint "at the trial and in his post-trial brief" to contend for Section 20(a) liability. The Court inadvertently misspoke itself. The only motion made by Gordon's counsel at the trial was made after both sides had rested and was as follows: (App. 334a):

> "MR. LOEWINTNAN: I would like to move at this time for a rescission of the sale of the 4500 shares to Mr. Gordon on the ground that the sale was unlawful."

Section 20(a) liability was, in fact, claimed for the first time in Gordon's Post-Trial Brief.

Spector v. Mermelstein, 485 F. 2d 474, 480 (2d Cir., 1973).

List v. Fashion Park, Inc., 340 F. 2d 457 (2d Cir., 1965).

We acknowledge the Rule in this Circuit that a finding is clearly erroneous when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed (See cases cited in Spector v. Mermelstein, supra, at page 480, and see also: S.E.C. v. Texas Gulf Sulphur Co., 401 F. 2d 833 (2d Cir., 1968)). We respectfully submit, however, that this Court cannot, on this record, arrive at such a conviction insofar as Elpac is concerned, and that, accordingly, the "clearly erroneous" standard precludes reversal of the judgment dismissing the Complaint against Elpac on the merits.

POINT II

THE FACTS ADDUCED AT THE TRIAL PRODUCED NO EVIDENCE OF ANY WRONGDOING BY ELPAC.

A - The record is devoid of any evidence of Elpac's involvement in the claimed fraud.

The trial transcript is completely devoid of any shred of evidence that Elpac had any connection whatsoever with the transaction between Gordon, Burr and Lord, other than the fact that shares of issued and outstanding stock of Elpac, owned by Burr, individually, were involved and other than the fact that at the time of the meeting in June, 1968, between Gordon, Burr, Lord and others, Burr was President of Elpac. (13)

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(13) As shown in footnote "4", supra, Burr (Continued on next page)

Rather than establishing participation in the fraud by Elpac, if any fraud was, in fact, involved, the record establishes that: (a) Gordon never requested or received any information of any kind, nature or description from Elpac; (b) Gordon did not rely upon any information of any kind, nature or description supplied by Elpac; (c) Gordon never communicated with any person associated with Elpac other than Burr; and (d) Gordon never addressed any letter of claim or complaint to Elpac prior to the institution of the instant suit. (14)

Furthermore, the record contains no evidence whatsoever that Elpac either: (a) participated in the alleged deception; (b) knew of the alleged deception; (c) received any of the benefits from the alleged deception; (d) owed any duty to Plaintiff to investigate into the nature of representations, if any, that were made to Gordon by Burr or by Lord; (e) aided and abetted in the making of such representations; (f) was a member of a conspiracy to defraud Gordon; or (g) was guilty of a willful or reckless disregard for the truth. Accordingly, as a matter of both fact (15) and law,

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(13)(Cont'd) was president of Elpac only through August 7, 1968, whereas the $45,000 was paid to Burr by Gordon on August 22, 1968 (App. 109a). We readily admit, however, that Burr was a director of Elpac between the period June, 1968, and February, 1969.

(14) Rather, to the contrary, in February, 1969, he complained to the New York Attorney General that he had not received his stock certificate (App. 115a).

(15) Whether such fact be independently determined by this Court or the finding of such fact by the Trial Court (App. 41a) be accepted as conclusively determinative.

Elpac cannot be held liable.

> Lanza v. Drexel & Co., 479 F.2d 1277, (2d Cir., 1973), and note 97 at P. 1305.
>
> Cohen v. Franchard Corp., 478 F. 2d 115 (2d Cir., 1973).
>
> Shemtob v. Shearson, Hammill & Co., 448 F. 2d 442 (2d Cir., 1971).
>
> Chris-Craft Industries, Inc. v. Bangor Punta Corp., 480 F. 2d 341, 363 (2d Cir., 1973).

B - Gordon's contention to the contrary is without merit.

In his Brief to this Court, Gordon contends that there was in fact "evidence indicating involvement (of Elpac) in the scheme to defraud" (Point V of Gordon's Brief at page 38 - emphasis added).

What is this alleged "evidence?"

1. That Burr allegedly "stated" that the shares of stock being sold had been hypothecated to secure a loan to Elpac and that at the same time Burr "stated" that the proceeds from the sale of his stock were to be used to pay off such loan.

2. That Burr allegedly "stated" that the stock would be registered and the consent of the Corporation to the sale would be obtained and that on August 20, 1968, Burr sent Gordon a telegram advising that registration of the stock had been approved by Elpac's Board of Directors on August 7, 1968.

The record itself answers these claims thusly:

As to "1."

(a) Paragraph 13(h) of the Complaint (App. 8a) itself alleges:

"The Defendant did not lend the funds received from the Plaintiff to the Defendant Elpac, and the Defendant Elpac did not pay corporate notes held by creditor banks."

(b) Stanley Jacobson, Esq., the putative attorney for Gordon, who allegedly "asked many, many questions of Mr. Burr," including questions about "the bank that had lent money to the corporation" (App. 86a-87a and 196a) testified that he did not recall any conversations at all as to the use of the moneys for the purchase of the stock (App. 210a).

(c) At the conclusion of Gordon's case, Elpac moved to dismiss the Complaint against it on the grounds that no prima facie case had been made out against Elpac (App. 249a-252a). During the course of the argument on the motion (decision was reserved, App. 252a), Gordon's counsel raised three points in opposition. Two of such points were as follows:

(i) that Elpac had participated, through its President (App. 251a).

The Trial Court correctly answered this point by stating:

"Mr. Burr may have been its president, but, Mr. Burr was selling Mr. Burr's stock." (App. 251a)

(ii) that the proceeds of the sale were to be used for Elpac's benefit. (App. 251a)

The Trial Court's reply here was as follows (App.251a-252a):

"That is what it was going to be used for. I have no indication and <u>there is no proof in the record as to what any of the money from the sale of the stock was used for</u>. (emphasis added) Mr. Steinberg said that is what Burr said he was going to do with it.

"Presumably, if Burr wanted, he could have gone to the race track. I invite you to tell me what

corporate act or what act of Burr in his capacity as president and or chairman, whatever he was, what act in the course of employment raises the responsibility of Elpac? Most everything I heard seems to me has to do with Burr and almost nothing has to do with the activities of his as the president of Elpac." (16)

As to "2."

(a) Paragraphs (13(c) and (d) of the Complaint (App. 8a) allege:

"(c) The stock purchased by the plaintiff was not registered by April 30, 1969, or at any time thereafter. (17)

"(d) The Defendant Burr did not receive permission from the Defendant Elpac to consummate the sale of his stock to the plaintiff."

(b) During the argument on Elpac's motion to dismiss the Complaint, Gordon's counsel pointed to the telegram of Burr (Gordon's Exhibit 4 at App. 346a) and seemed to contend that it was signed by Elpac. Completely ignored by Gordon's counsel, however, were the following facts:

(i) The telegram is written in the first person.

(ii) The telegram commences by stating, "I, Robert Burr, agree to ***."

(iii) The telegram is not, in fact, signed "Elpac, Inc." Rather, it is signed "Robert L Burr Elpac Inc."

(iv) Gordon insisted upon Burr and Lord initialing the

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(16) Gordon's counsel did not accept the Trial Court's invitation -- for, indeed, he could not!

(17) Gordon's counsel told the Trial Court: "To this date the stock has not been registered." (App. 252a). We admit that such is the true fact.

"amendment" to the telegram. An approval by Elpac was not ever considered. (App. 109a-110a)(18)

(v) Burr was not Elpac's President on August 22, 1968, when the $45,000 was paid to Burr by Plaintiff. (19)

C - Gordon's argument concerning the August 7, 1968, minutes is a red herring.

As a corollary to Gordon's proposition that there was in fact "evidence" indicating involvement of Elpac in the "scheme to defraud," he attempts to make much of the fact that he had "demanded production of the minutes of the crucial (as he terms it) meeting of August 7, 1968, and Elpac had been unable to produce those minutes." (Page 41 of Gordon's Brief to this Court.) (20)

This contention is completely without merit and is nothing but a red herring!

Firstly, it is basic text book law that in a civil case the sole consequence of a party's failure to produce a document at a trial pursuant to a Notice to Produce is the enabling of the other party to introduce secondary evidence of the contents of such document.

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(18) See Notes (4) and (13) supra.

(19) The Trial Court also found that it was "Burr's telegram." (App.41a).

(20) Burr's telegram to Gordon, Plaintiff's Exhibit 4 at App. 346a, stated that the Board of Directors of Elpac had approved a registration statement for the stock being sold to Gordon at a meeting held on August 7, 1968.

Secondly, and more importantly, the Court, and all parties, were told at the trial by counsel for Elpac that the minutes of the meeting of the Board of Directors of Elpac held on August 7th contained no resolution authorizing a registration statement for Burr's stock that was being sold (App. 323a-324a and App. 330a-331a).

Counsel initially undertook to supply the minutes of August 7 "if they came in" to his office (App. 324a). When counsel learned that such minutes were in fact at his office, he so advised the Court, in open Court, and in full hearing of all, and offered to let the Court see them despite the fact that, as he said, the minutes did not contain any such resolution. (App. 331a).

Counsel for Gordon did not protest; did not insist upon the production of the minutes (21); and did not then question the truth of the statement of Elpac's counsel. Nevertheless, he now, in Point V of his Brief to this Court, utters and mutters about "suspicious circumstances;" speaks about inferences that "should" be drawn from the non-production of the minutes; and, seriously(?), seems to contend that his self-labeled "inferences" are the equivalent of "the weight of evidence."

We believe these nebulous assertions to be totally without legal substance and submit that this Court should so treat them.

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(21) He could have asked for an adjournment until they were brought to Court; but he did not.

D - Gordon's contention that proof of a negative simultaneously constitutes the creation of an inference of proof of a positive is manifestly impalpable.

Gordon contends (we truly believe with tongue in cheek):

(i) that his attempted factual proof at the trial of the falsity of the alleged representations made to him by Burr and Lord imposed a burden upon Elpac to either join with him in such proof, or to prove their truth; and

(ii) that Elpac's failure to do so created an inference of the truth of the very things that Gordon was trying to prove were false; which inference, left unrebutted by direct testimony of Elpac, constitutes the "weight of the evidence." To say it another way, Gordon contends that proof of a negative simultaneously constitutes the creation of an inference of proof of a positive -- and -- for that matter -- vice versa.

Completely ignored by Gordon in his advancement of this startling proposition are the following:

(i) the allegations of his complaint;

(ii) his burden of proof;

(iii) what he set out to prove at the trial;

(iv) Elpac was under no duty, as a matter of law, to testify;

(v) Gordon could have compelled Elpac to testify -- but he did not;

(vi) Gordon could have compelled Burr to testify -- but he did not;

(vii) no inference may be drawn from the failure of Elpac to call Burr to testify as Burr was not within the control of Elpac.

Also completely ignored by Gordon is the fact that whether a plaintiff's burden of proof in a private damage action under Section 10(b)of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder is the "preponderance of the evidence" test, or the "clear and convincing" standard derived from Common Law fraud (22), the inferences that Gordon speaks of meet neither test for it is the unalterable fact that the sole "proof" of participation or involvement by Elpac in the alleged fraud consists of a vague vacuum of wishful conjecture on the part of Gordon. But, the law simply does not permit blame to be based solely upon mere guess, conjecture, surmise, possibility, speculation or inference.

See: Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 578 (1951).

Iwaniuk v. Bethlehem Steel Corp. 402 F.2d 309, 311 (7th Cir., 1968).

Euson v. Starrett, 277 F.2d 73, 75-76 (7th Cir., 1960).

(To readily evaluate the requirement of a showing of either scienter, or facts amounting to scienter, in a 10b-5 case versus conjecture or inference, see the language of this Court in Lanza v. Drexel & Co., supra, at pages 1304-1305.)

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(22) See discussion and cases cited by Griesa, J., in Kass v. Hornblower & Weeks-Hemphill Noyes, F. Supp. , Par. 94, 721, CCH Fed. Sec. L. Rep. (S.D.N.Y., July 12, 1974).

E - Inferences may not be based upon mere speculation, guess or conjecture.

Despite the language of the United States Supreme Court in the 1896 case cited by Gordon at page 40 of his brief to this Court (Kirby v. Tallmedge, 160 U.S. 379), which language, by the way, was pure dicta, the law seems quite clear that inferences may be drawn only from facts introduced in evidence and may not be based upon mere speculation, guess or conjecture.

See: Tyrrell v. Dobbs Investment Co., 337 F. 2d 761 (10th Cir., 1964).

Waters v. National Life & Accident Ins. Co., 156 F. 2d 470, 472 (10th Cir., 1946).

Kenney v. Washington Properties, Inc., 128 F. 2d 612, 615 (U.S.C.A. D.C. 1942).

Jaramillo v. United States, 357 F. Supp. 172 (S.D. N.Y. 1973).

See also: Tropea v. Shell Oil Company, 307 F. 2d 757, 764 - 765 (2d Cir., 1962).

Furthermore the trial court:

(i) has the function of weighing the evidence and choosing from among conflicting inferences those which he considers most reasonable (Penn-Texas Corporation v. Morse, 242 F.2d 243, 247 [7th Cir., 1957]); and

(ii) has the right to reject any inferences that may be created (Wright v. Rockefeller, 376 U.S. 52, 56-57, 1964).

The trial court, therefore, by rejecting any inferences that may have been created by Elpac's failure to testify, was doing what it was entitled to do as a matter of law, and was not acting

against the "weight of evidence" as Gordon claims. (23)

POINT III

ELPAC CANNOT BE HELD LIABLE FOR THE COMPLAINED OF WRONGFUL ACTS OF BURR

It is not in dispute that: (i) Burr was the President and a director of Elpac when Gordon first met him in June, 1968, but was not Elpac's President when the alleged fraud was "consummated" on August 22, 1968, the date that Gordon paid over the $45,000 to Burr; and (ii) Burr was a director of Elpac on both dates. Nevertheless:

A - Elpac is not liable under the doctrine of respondeat superior.

We do not believe that an extended discussion of law is necessary in order to establish the distinction between an officer of a corporation and an individual director of a corporation for it is a basic tenet of corporate law that an individual director has no individual power of action as does an officer who is usually elected or appointed to perform specific duties as agent of the corporation by the board of directors. (2 Fletcher Cyc. Corp. (Perm.Ed.) Sec. 271, P. 33).

The legal liability of a corporation for the false representations of an officer or agent of a corporation is expressed thusly in 10 Fletcher Cyc. Corp. (Perm. Ed.) Sec. 4886, pp. 300-301:

> "While a corporation is liable for the false representations and other frauds made or commited by an

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(23) For the rule of law that mere speculation cannot do duty for probative facts, see: Galloway v. United States, 319 U.S. 372, 395 (1943) and Noel v. United Aircraft Corporation, 342 F.2d 232, 239 (3rd Cir., 1964).

> officer or agent in the course of his employment and for the benefit of the corporation, or, by the weight of authority, as has been shown, in the apparent course of his employment, although for his own benefit, it is not liable for false representations or other frauds which are not made or committed by the officer or agent in either the actual or apparent course of his employment, unless ratified by it. This rule applies when it is sought to hold a corporation liable for false representations made or other frauds committed by an officer in the course of a transaction in which, with the knowledge of the party, he is acting, not for the corporation, but individually, as where he is selling shares of stock owned by him, and makes false and fraudulent representations to effect the sale,..."

See also: Restatement, Agency 2d, Sections 219 and 235.

Williams v. United States, 248 F.2d 492,(9th Cir., 1957) cert. den., 355 U.S. 953.

Manhattan Life Ins. Co. v. Forty-Second St. & Grand St. Ferry R. Co., 139 N.Y. 146 (1893).

In Manhattan Life Ins. Co. v. Forty-Second St. & Grand St. Ferry R. Co., supra, the New York Court of Appeals affirmed a judgment in favor of the defendant corporation where the president of the corporation had issued his promissory note to the plaintiff and, as collateral for the loan, delivered 100 shares of the defendant corporation's stock registered in his name. The stock certificates, however, had been forged by the president. The president defaulted on the loan and the plaintiff demanded that the defendant corporation transfer the stock to the name of the plaintiff, which demand was refused by the corporation.

The Court of Appeals laid down the following principles which, even upon the assumption that a director of a corporation is an "agent" of a corporation (which we deny), are uniquely applicable

to this case:

> "The declarations of an agent are only admissible against his principal when made as a part of a transaction undertaken in behalf of the principal, or in the performance of the duties of his agency. (First Nat'l Bk. of Lyons v. Ocean Nat'l Bk. 60 N.Y. 278). Or, as is sometimes stated, the representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency, which is but another form of expressing the same proposition."

In Williams v. United States, supra, the Court of Appeals for the Ninth Circuit, in dismissing a claim against the United States Government for an accident caused by a serviceman who used an army truck for his own recreation purposes stated:

> "One need not examine a multitude of cases to justify application of the basic and universally accepted rule in our jurisprudence that a pre-condition for application of the respondeat superior doctrine is that the employer becomes vicariously liable only when the servant, at the time of the accident, is conducting the parties' affairs. United States v. Eleazer, 4th Cir. 177 F.2d 914, 916. Or as Judge Cardoza expressed it in Fiocco v. Carva, 234 N.Y. 219, 223, 137 N.E. 309, 311, the dominant purpose must be proved to be in the performance of the master's business. In no material respect does California jurisprudence part company with, or fail to recognize that the touchstone for respondeat superior liability is the furtherance of the master's business...'

Just as it was clear to the Court at the trial (App. 251a) that "Mr. Burr was selling Mr. Burr's stock" so also was it clear to Gordon.

Since Burr was not acting on behalf of Elpac, which Gordon knew, and since there is no element of reliance upon apparent authority present in this case, Elpac cannot be held liable for the complained of wrongful acts of Burr under the doctrine of respondeat superior.

B - Elpac is not liable under Section 20(a).

Elpac does not quarrel with the rationale of the cases imposing Section 20(a) liability upon broker-dealers because of the fact that broker-dealers owe a duty to the public to supervise their employees in an adequate and reasonable manner. If, however, the underlying principles imposing vicarious liability upon broker-dealers were to be applied to a case of the nature here before this Court, then all corporations would be required to either: (i) over-see all personal stock transactions of their officers, directors and employees -- perhaps, even to over-see all stock transactions of each of their stockholders -- ; or (ii) become 10b-5 "insurers." We surely cannot conceive of such a rule of law ever being established.(24

The Trial Court's findings of fact and of law with respect to Elpac's potential liability, both directly and vicariously, are fully discussed at pages 10 through 12 of this brief, and we believe that the applicable principles of law are fully discussed in Point II.

It would therefore unduly burden the Court, and prolong this brief, to again review them. Suffice it to say here that we believe that Section 20(a) does not impose ipso facto liability upon a corporation for all personal transactions of an officer or director. Something more is needed - and that "something more" is not present in this case.

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(24) We are not here speaking of the Texas Gulf Sulphur type of case - SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2nd Cir. 1968), or of the aiding and abetting and other special situations described at page 14, infra.

Accordingly, we submit that the Trial Court was correct in all respects when it found, and held: (App. 42a)

> "I find no evidence in this record of control, direct or indirect of Burr by Elpac in what were clearly not corporate acts. I, therefore, hold that Elpac is not liable under Section 20(a)."

POINT IV

EACH OF THE APPEALS BY GORDON SHOULD BE DISMISSED AS AGAINST ELPAC UPON THE GROUND THAT EACH IS FRIVOLOUS AS AGAINST ELPAC

A - Power of this Court to dismiss the appeal.

This Court may, in the exercise of its plenary power, dismiss a civil appeal as frivolous (John v. Gibson, 270 F.2d 36, 39 [9th Cir., 1959] ; see also A/S Kredit Pank v. Chase Manhattan Bank, 303 F. 2d 648 [2d Cir., 1962]).

B - No questions have been, or are, properly presented for review, vis-a-vis Elpac, on Gordon's appeal from the judgment.

By order of this Court dated April 9, 1974, this Court adopted a Civil Appeals Management Plan (the "Plan") applicable to all civil appeals to it from the district courts in the Second Circuit in which a Notice of Appeal is filed on or after April 15, 1974. Such Plan was stated in its order of adoption to have the force and effect of a local rule adopted pursuant to Rule 47 of FRAP.

The Notice of Appeal by Gordon was filed on May 24, 1974, (App. 3a), and, accordingly, this Appeal is governed by the Plan.

The "Civil Appeal Pre-Argument Statement" filed by Gordon, as required by the Plan, specifies the "ISSUES PROPOSED TO BE RAISED ON APPEAL" thusly:

"Dismissal of action as against defendant Lord and defendant Philips, Appel & Walden was in error.

"Denial of motion to vacate judgment was in error."

We submit, therefore, that this Court should decide whether or not its own rules should be enforced. If they are to be enforced, then the appeal by Gordon from the judgment should be dismissed as against Elpac upon the ground that no questions have been, or are, properly presented to this Court for review, insofar as Elpac is concerned -- hence such appeal, vis-a-vis Elpac, is frivolous. (25)

C - No questions have been, or are, presented for review, vis-a-vis Elpac, on Gordon's appeal from the denial of his "motion to vacate" the judgment.

While Gordon's motion to vacate the judgment appears, in form, to be a motion to vacate the entire judgment, it is not such in substance.

Thus, the affidavit submitted to the Court below in support of Gordon's motion avers that:

(a) "Defendants Lord and Phillips, Appel & Walden (P.A.W.) were third persons who procured the sale through improper actions.*** In other words, if Burr fails to make full restitution, Lord and P.A.W. must pay the balance." (App. 58a-59a).

(b) "With such testimony added to the record plaintiff will

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(25) Issue "3" of the "issues presented on this appeal" in Gordon's Brief to this Court at page 4 is truly a "just-in-case" specious issue, i.e., "just-in-case the Court of Appeals reverses the judgment, I (Gordon) can get another crack at Elpac." The Court's attention is also respectfully called to the "Conclusion" contained in Gordon's Brief at page 43. That, too, clearly shows that Gordon is, in fact, appealing from the denial of relief against Lord and P.A.W. -- Elpac is not even mentioned.

seek damages against Defendants Lord, P.A.W. and Burr, in lieu of rescission." (App. 59a)

Similarly, Gordon's memorandum of law annexed to his motion (App. 59a) stated, in its very first sentence, "This brief assumes, in accordance with Judge Bauman's opinion, that defendant Elpac is not liable to plaintiff." (App. 62a - 63a).

We submit, therefore, that the record before this Court establishes that no questions have been, or are, presented to this Court for review, insofar as Elpac is concerned, on Gordon's appeal from the denial of his motion to vacate the judgment, and that, accordingly, such appeal should be dismissed as frivolous. (26)

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(26) See also note (25) supra.

CONCLUSION

For the reasons stated above, we respectfully submit that:

1. Each of the appeals by Gordon should be dismissed, in all respects, as against Elpac, upon the ground that each is frivolous as against Elpac; or, in the alternative,

2. That portion of the judgment appealed from as dismisses the complaint against Elpac on the merits should be affirmed; and

3. In the event the Court is disposed to mandate the opening of the judgment pursuant to Gordon's motion in the Court below, such mandate should not affect the judgment of dismissal of the complaint against Elpac on the merits.

Respectfully submitted,

Harry Balterman
Attorney for Defendant-
Appellee Elpac, Inc.

Dated: New York, N. Y.
August 20, 1974

ADDENDUM

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78j(b), provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-
>
> * * *
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 promulgated by the Commission under the Securities Exchange Act of 1934, 17 C.F.R. Sec. 240.10b-5, provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

Section 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78t(a), provides:

> "(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter, or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1749

IRVING GORDON,

Plaintiff-Appellant,

- against -

ROBERT L. BURR, Defendant-Appellee; ELPAC, INC., Defendant-Appellee; ARNOLD LORD, Defendant-Appellee-Appellant; and PHILIPS, APPEL & WALDEN, INC., (Sued herein as PHILLIPS, APPEL & WALDEN), Defendant-Appellee-Appellant

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of New York)

The undersigned, an attorney admitted to practice in the United States Court of Appeals For the Second Circuit does hereby certify and affirm that he is the attorney of record for Defendant-Appellee Elpac, Inc., herein and that on the 21st day of August, 1974, he served two copies of the "Brief For Defendant-Appellee Elpac, Inc." upon each of the attorneys set forth below, at the addresses set forth below, such addresses being those designated by said attorneys for that purpose, by depositing such two copies enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York:

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The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

New York, New York
August 21, 1974

Harry Balterman